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Philip Harvey
Associate Professor of Law and Economics

July 18, 2006

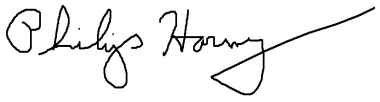
Hon. Sam Johnson, Chair
Hon. Rob Andrews, Ranking Member
Subcommittee on Employer/Employee Relations
Education and Workforce Committee
U.S. House of Representatives

RE: Possible Legislative Responses to *San Manuel*

Dear Chairman Johnson and Ranking Member Andrews:

Attached please find a statement expressing my views concerning possible legislative responses to *San Manuel Indian Bingo and Casino*, 341 N.L.R.B. 138 (2004). The views expressed in the statement are my own rather than those of Rutgers University or the Rutgers School of Law – Camden. I appreciate the Subcommittee's consideration in allowing me to testify on this matter.

Sincerely,



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STATEMENT

OF

PHILIP L. HARVEY
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to the

Subcommittee on Employer/Employee Relations

Education and Workforce Committee
United States House of Representatives

July 20, 2006

The National Labor Relations Board (NLRB or Board) decision in *San Manuel Indian Bingo and Casino*, 341 N.L.R.B. 138 (2004), invites reflection on how federal law should honor the possibly competing goals of properly respecting the sovereignty of American Indian tribes and the right of Indians and non-Indians alike to form, join and assist trade unions. My statement will address that issue, with emphasis on the principles that I believe should guide a possible legislative response to the case. My general point will be that the Congress can and should seek to advance both the goal of enhancing tribal sovereignty and the goal of protecting the associational rights of Indian and non-Indian workers. It can best do this, I suggest, by granting Indian tribes the right to preempt NLRB jurisdiction by adopting labor relations ordinances, ultimately enforceable in the federal courts, that afford rights to their employees that are at least as protective as those afforded by the NLRA and which also are consistent with the human rights obligations of the United States.

Respecting the Sovereignty of American Indian Tribes and the Right of Association of Indian and Non-Indian Workers

(1) The goal of any legislative response to the *San Manuel* case should have two objectives. Rather than seeking to reaffirm or enhance the sovereignty of Indian tribes at the expense of employee rights or to reaffirm or enhance employee rights at the expense of tribal sovereignty, the Congress should seek to enhance both tribal sovereignty and the associational rights of both Indian and non-Indian workers. Moreover, it should do this whether or not the Board's order in *San Manuel* is enforced by the courts.

(2) This dual goal is consistent with long-standing principles of American law. The sovereignty that Indian tribes are recognized to possess is rooted in their history and affirmed in treaties the federal government has concluded with them. While opinions may differ as to the nature and extent of that sovereignty in particular instances, I believe there is broad agreement that enhancing the sovereignty of Indian tribes and expanding their capacity to address the needs of their members will

serve the interests of both tribal members and the broader American public of which they form a part. A commitment to protecting the right of workers in the United States to form, join and assist trade unions also is deeply rooted in American law – most notably in the enactment of the NLRA– and while strong disagreements may exist over the proper boundaries of those rights, I believe there is broad agreement that the public interest is served by their continued protection.

(3) This dual goal also comports with international human rights standards that the United States has committed itself to observing. The International Covenant on Political and Civil Rights (ICCPR), U.N. Doc. A/6316 (1966), which the United States ratified in 1992, affirms the right of all peoples to "self-determination," to "freely pursue their economic, social and cultural development," and to "freely dispose of their natural wealth and resources." ICCPR, art. 1. While this language does not dictate the nature or extent of the sovereignty American Indian tribes should enjoy, it does underscore the fact that they are entitled, as a matter of right, to special deference by virtue of their unique historical status within the United States.

The ICCPR also provides that "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests" and that "[n]o restriction may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others." ICCPR, art. 22. As with the right to self determination recognized in Article 1 of the ICCPR, the right of association recognized in Article 22 does not dictate the specific legal rights workers must be accorded, but it does underscore that the United States has a legal duty to guarantee these rights to all persons, including individuals employed at enterprises owned and operated by Indian tribes.

Article 2 of the ICCPR makes this clear. It provides that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The United States has assumed a duty under the ICCPR to protect the right of both Indian and non-Indian workers employed in tribal enterprises to form, join and assist trade unions, and any attempt to accord them a lesser level of protection than other workers in the United States would likely violate this duty.

The United States also has an obligation "arising from the very fact of [its] membership" in the International labor Organization (ILO) " to respect, to promote and to realize, in good faith and in accordance with the Constitution [of the ILO], the . . . freedom of association and the *effective* recognition of the right to collective bargaining." ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June 1998 (the ILO Declaration) (emphasis added). This obligation (i.e., compliance with the ILO Declaration) subsequently has been incorporated into the Inter-American Democratic Charter, OAS Doc. OEA/SerP/AG/Res.1 (2001), and both the US-Chile Free Trade Agreement (US-Chile FTA), Pub. L. No. 108-77, 117 Stat. 909, 911 (2003), and the US-Singapore Free Trade Agreement (US-Singapore FTA), Pub. L. 108-78, 117 Stat. 948 (Sept. 3, 2003).

(4) I am not suggesting that these obligations create any legally enforceable rights for American workers either on or off tribal lands. The United States ratification of the ICCPR, for example, expressly noted that the rights recognized in the Covenant should not be considered self-executing, and neither the US-Chile FTA nor the US-Singapore FTA appear to contemplate the creation of self-executing labor rights either. Still, as duly ratified treaties of the United States, these agreements are part of the "supreme Law of the Land," U.S, Const. art. VI, § 2., and they impose obligations on the federal government that Congress should feel bound to fulfill.

For example, both the US-Chile FTA and the US Singapore FTA contain virtually identical provisions, pursuant to which "[t]he Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998). Each Party shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in Article 18.8 are recognized and protected by its domestic law. . . [E]ach Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights set forth in Article 18.8 and shall strive to improve those standards in that light." US-Chile FTA, art. 18.1.1 & 18.1.2. The "internationally recognized labor rights set forth in Article 18.8" include "(a) the right of association" and "(b) the right to organize and bargain collectively."

The Congress, of course, may decline to implement these provisions, but in so doing, it would cause the United States to default on its international obligations – something I presume most Members would be loathe to do. Indeed, there are probably no international obligations that it is more important for the United States to honor than its human rights obligations.

My point is simple. When the Congress considers legislation that touches on either the sovereignty of American Indian tribes or the rights of workers to form, join and assist trade unions, it should be mindful of and seek to satisfy the human rights obligations the United States has assumed with respect to the subject matter of the proposed legislation. In this instance, that means being mindful of and seeking to satisfy the United States' obligation to honor both the rights of American Indian Tribes arising out of their limited sovereignty and the associational rights of all persons in the United States referenced in the ICCPR and the ILO Declaration.

Possible Legislative Responses to *San Manuel*

(5) The bill which is the subject of this hearing (HR 16 IH) is inconsistent with the dual goals I have suggested should be the object of any legislative response to the *San Manuel* case, and it also is inconsistent with both the policy goals embodied in U.S. labor law and the human rights obligations the United States has assumed.

The bill is inconsistent with the dual policy goals I have identified because it seeks to extinguish one (protecting the right of association) for the sake of honoring the other (respecting the sovereignty of Indian tribes). It is inconsistent with the policy goals embodied in U.S. labor law, because it would fail to guarantee protection of the rights enumerated in Section 7 of the NLRA for both Indian and non-Indian employees who otherwise might be subject to the jurisdiction of the NLRB, and it would fail to maintain the level playing field and equality of bargaining power that the NLRA seeks to maintain among and between employers and employees engaged in interstate commerce. Finally the statute would be inconsistent with the human rights obligations of the United States because it would

not guarantee the right of association of persons employed by tribal enterprises operating on tribal land.

(6) A better legislative strategy, in my view, would be one that sought to honor both the sovereignty of Indian tribes and the right of association of their employees. The best way to achieve these dual goals in my view, would be to grant Indian tribes the right to enact and administer labor relations ordinances on their own lands that would preempt the jurisdiction of the NLRB, but only on condition that the legal regimes they establish are at least as protective of the associational rights of their employees as the NLRA, and that they also conform with the obligations of the United States under the ICCPR and ILO Delcaration.

Although these objectives could be at least partly achieved by amending Section 10 of the Act to permit the Board to enter into the same kind of cessionary agreements with Indian tribes that it is now authorized to enter into with States and Territories, legislation along those lines would, I believe, unnecessarily limit the authority of Indian Tribes to establish legal regimes more protective of the associational rights of their employees than the NLRA, and it also would leave the Board with the unilateral authority to enter or not to enter such cessionary agreements.

A strategy that would more fully honor the sovereignty of Indian tribes while also allowing for enhanced protection of the right of association of tribal employees, would be to add a provision to the "Limitations" sections of the NLRA (presently Sections 13-18) that would permit tribes to preempt the NLRA by adopting labor relations ordinances and enforcement regimes that provided legal protections for the right of association of their employees that are equal to or greater than those provided by the NLRA and which also conform to the internationally recognized labor rights referenced in the ICCPR and the ILO Declaration. Approval of a tribal labor relations regime could be vested in the Board to ensure that the tribal plan complied with these requirements, and the Board's decision in that regard could be made reviewable by the Circuit Courts of appeal. Enforcement of the rights established pursuant to a tribal plan would be vested in the tribes themselves, with the U.S. Courts of Appeal being given jurisdiction to review cases in which a complaining employee asserts that s/he has not been accorded rights at least equal to those afforded under the NLRA and/or consistent with internationally recognized labor rights.

Such legislation would enhance the right of association of tribal employees by guaranteeing them protection at least equal to that afforded by the NLRA, and it also would enhance the sovereignty of American Indian tribes by authorizing them to develop and administer a labor relations regime of their own devising in conformity with both U.S. and internationally recognized labor standards.

(7) This legislative strategy is not only workable, but there is precedent for it in the statutory design of the Occupational Safety and Health Act (OSHA). Section 667 of OSHA establishes a mechanism whereby States may "assume responsibility for development and enforcement therein of occupational safety and health standards," 29 USC § 667(b), provided the proposed regulatory regime "will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 6555 of this title which relate to the same issues," id. § 667(c)(2). Authority to approve and monitor state plans pursuant to this provision is

vested in the Secretary of Labor, and the Secretary's decisions in that regard are made reviewable in the Circuit Courts of Appeal, id. § g.

OSHA does not grant this preemptive right to Indian tribes, but the reverse preemption model it embodies could be adapted quite easily for incorporation in the NLRA and applied to Indian tribes (and possible to states as well). The Congress need not choose between honoring the sovereignty of Indian tribes and protecting the associational rights of American workers. It can and should do both.

*** END OF STATEMENT ***